

DOUBLE JEOPARDY — Multiple Prosecutions and Multiple Punishments — Revised 11/2009

Defendants sometimes raise double jeopardy claims that they are being prosecuted twice, or punished twice, for the same conduct. The test for whether multiple prosecutions or multiple punishments for the same conduct violate the double jeopardy prohibition was established in *Blockburger v. United States*, 284 U.S. 299 (1932), and reestablished in *United States v. Dixon*, 509 U.S. 688 (1993) [overruling *Grady v. Corbin*, 495 U.S. 508 (1990)]¹:

In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. [Citations omitted.] The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

Dixon at 696.

In *Dixon*, the defendant was arrested and indicted for possession of cocaine with intent to distribute. He was also convicted for criminal contempt of court for this possession of the same cocaine, as it violated a condition of his release on an unrelated offense that forbade him from committing "any criminal offense." *Id.* at 688. Using the *Blockburger* test, the Court concluded that Dixon could not be subsequently prosecuted for the possession of cocaine with the intent to distribute, because the "possession with intent to distribute" offense did not include any element not contained in his previous contempt charge. Rather, the underlying substantive criminal offense was a "species of lesser-included offense" and any subsequent prosecution for the possession charge was barred by the Double Jeopardy clause. *Id.* at 698.

Also in *Dixon*, the Court considered a similar incident where the estranged wife of a second defendant, Foster, obtained a civil protection order against Foster prohibiting him from threatening, assaulting, or physically abusing her. On various dates, Foster violated the CPO: he assaulted and threatened her; threw her down a flight of stairs, kicked her, and pushed her head into the floor; and caused head injuries that made her lose consciousness. Foster was held in contempt of court for violating the order and sentenced to prison. Foster was then charged with simple assault and assault with intent to kill, based on the same incidents on which he already had been found in contempt of court. The Supreme Court held that Foster could not be prosecuted for simple assault, because that offense did not include any element not contained in the previous charge of contempt (committed by committing simple assault in violation of the civil protective order). However, the double jeopardy clause was not violated by the

¹ See also *State v. Ortega*, 220 Ariz. 320, 325, 206 P.3d 769, 774 (App. 2008) (recognizing that the "same elements" test reaffirmed in *Dixon* is the only permissible interpretation of the double jeopardy clause).

charge of assault with the intent to kill. Applying the *Blockburger* "same-elements" test, the Court stated that "[u]nder governing law, [the assault with intent to kill] requires specific intent to kill; simple assault does not. [Citation omitted.] Similarly, the contempt offense required proof of knowledge of the [civil protection order], which assault with intent to kill does not." *United States v. Dixon*, 509 U.S. 688, 701 (1993). Therefore, even though the charge of assault with the intent to kill arose from the "same conduct" of the defendant as the previous contempt prosecution, the subsequent prosecution was not barred because the charges did not contain the "same elements."